

STATE OF MICHIGAN  
IN THE SUPREME COURT

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THE PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

Supreme Court  
No. 153828

THEODORE PAUL WAFER,

Defendant-Appellant.

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Third Circuit Court No. 14-000152-FC  
Court of Appeals No. 324018

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RESPONSE TO DEFENDANT'S CITATION OF SUPPLEMENTAL AUTHORITY

*People v Davis*, \_\_\_ Mich App \_\_\_ (No. 332081, 7-13-2017)

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Defendant says that his supplemental authority“ illustrates that convicting a defendant of mutually exclusive offenses is a double jeopardy violation.” But *Davis* did not find a violation of double jeopardy, but posited a doctrine of “mutually exclusive” offenses that can bar conviction of multiple offenses *apart* from and *in addition to* the jeopardy protection, and on a claim not raised by the defendant in that case, and on which the court did not request briefing.

In *People v. Doss*, 406 Mich 90, 99 (1979) this court said that “ Elements are, by definition, positive. A negative element of a crime is a contradiction in terms, holding that the term “without malice” regarding the assault described in MCL 750.329 “is the absence of an element, rather than an additional element which the people must prove beyond a reasonable doubt.” It is quite possible, then, for one to be convicted of this form of manslaughter (or any form) even if the proofs show that the killing *was* accomplished with malice. Though the panel in *Davis* paid lip-service to *Doss*, it nonetheless treated words of limitation as though they are elements in determining that the offenses of aggravated domestic violence and assault with intent to do great bodily harm are “mutually exclusive” because an aggravated domestic violence can be committed without proof of intent to do great bodily harm—“an individual who assaults ... an individual with whom he or she has or has had a dating relationship ... without a weapon and inflicts serious or aggravated injury upon that individual *without intending to commit murder or to inflict great bodily harm* less than murder.” This is no different than the “without malice” language in MCL 750.329, and the Court of Appeals could only find the offenses irreconcilable by treating this negative as though it were an element. This Court should deny leave on this issue, or, grant leave on it, as the Court of Appeals raised an issue of first impression in this State.